In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No.

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

BRIEF IN SUPPORT OF PETITION.

Opinions of Lower Courts.

Circuit Court Opinion (R. 1996) reported at 141 Fed. (2d) 285. Rehearing denied without opinion.

There were two opinions in the District Court, viz.:

On the merits (R. 440)—45 Fed. Supp. 524;

Sustaining jurisdiction—26 Fed. Supp. 240.

Judgments of Lower Courts.

District Court. Decree entered July 2, 1942 (R. 458); motion to vacate denied August 17, 1942 (R. 737); notice of appeal filed September 9, 1942. (R. 746.)

Circuit Court. Judgment entered March 1, 1944 (R. 2004); petition for rehearing in bank denied April 7, 1944. (R. 2061.)

JURISDICTION.

Statement required by Rules 12(1), 27(2c) and 38(2), is presented at page 23 of Certiorari Petition. We adopt same as part of this brief.

STATEMENT OF THE CASE.

This is a derivative suit brought by Ernest H. Denicke on behalf of The Anglo California National Bank of San Francisco. The claims joined involve losses on loans made in violation of 12 USCA 595. The accounts may be grouped under three headings, viz.:

George Shima loans	$1,108,648.17
Empire Farms account	1,293,773.60
Directors' loans	1,626,027.75
Total	$4,029,449.52 (R. 404)

The Shima account represents credits extended to the late George Shima—an alien Japanese—to support a speculation of Herbert Fleishhacker in a tract of unirrigated desert land in Eastern Oregon. Fleishhacker procured bank loans to enable Shima to buy that property; and received a one-third interest as his compensation.

The Empire Farms account represents credits extended in an effort to cover up the fraud. Fleishhacker became executor of the Shima Estate. His position of trust therein, and as president of the bank was abused by drawing the latter into a hopeless reorganization.

During the suit Denicke found that many directors were involved in illegal loans. Liability therefor was protected by amendment.

The parties joined included Herbert Fleishhacker, Mortimer Fleishhacker and Mortimer Fleishhacker, Jr.—liable on the ground of direct participation—also other directors[1] responsible because of abdication and assent to continuing violations of federal banking laws.

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[1]List of defendants includes persons identified with various financial interests at San Francisco, viz.:
R. Stanley Dollar (of Dollar Steamship Company);
George I. Cochran (former president Pac. Mutual Life Ins. Co.);
Samuel Kahn (president of Market St. Ry. Co.—local utility);
Walter A. Haas (manufacturer and director of S. F. Bank);
Joseph O. Tobin (director Hibernia Savings & Loan Soc.);
Alfred B. Swinerton (contractor);
Paul Shoup (former president Southern Pacific Co.);
Philip S. Baker (vice-president Baker, Hamilton & Pac. Co., wholesalers in hardware and contracting equipment);
Willard O. Wayman (general manager National Fire Ins. Co. of Hartford).
Other defendants are bank employees, viz.:
Leon Sloss, Jr. (son-in-law of Mortimer Fleishhacker);
Victor Klinker (secretary of bank—named as defendant in fraud suit known as *Blum v. Fleishhacker*);
Paul E. Hoover (vice-president—a former bank examiner).

Proceedings in the District Court.

Suit was filed November 7, 1938. Fleishhacker *and the bank* made an attack on the jurisdiction. (R. 926, item 5.) That motion was denied.[2] Then the bank waited while its directors moved to dismiss for failure to state a claim. These motions were denied February 28, 1940. (R. 81.)

Interrogatories were propounded to compel disclosure of directors' loans. (R. 84.) The bank insisted that a reply would reveal affairs of its "customers". It claimed to be a "nominal defendant". Its counsel denied our right to submit interrogatories. Answers were obtained in April, 1941. (R. 191.) These concealed $3,900,000 in directors' accounts.[3]

For more than a year after suit, the bank was represented by counsel also acting for the Fleishhackers.[4] Chickering & Gregory, who were counsel for some of the directors, were substituted in February, 1940 (R. 80), have acted since that date.[5]

There were some shifts in the management. Herbert Fleishhacker was forced to resign one month after suit. His successor, Mortimer Fleishhacker, served until April 1, 1939. Then William H. Thomson was elected. The

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[2](R. 930, Item 59.) Jurisdiction was sustained on authority of *Chesbrough v. Woodworth*, 244 U.S. 72. Opinion reported as Denicke v. Anglo Bank, 26 Fed. Supp. 240.

[3]The items making up this total concealment are listed at page 15 of the petition.

[4]Messrs. Sullivan, Roche & Johnson, of San Francisco, counsel for Mortimer Fleishhacker and Mortimer Fleishhacker, Jr. (R. 924.)

[5]Chickering was substituted out for directors Hoover (R. 72), Reis (R. 72), Sloss (R. 73), Kahn (R. 75), Neustadt (R. 76), and Wayman (R. 77) in October and November, 1939, and appeared in substitution for Sullivan, Roche & Johnson February 26, 1940. (R. 80.)

"Thomson management" has been in charge since that time.

The first settlement discussion occurred in December, 1939. Thomson and Chickering requested Denicke to agree to a dismissal without enforcement of liability.[6] He refused.

The annual meeting was held a month later. Denicke sought appointment of a special committee to investigate claims. That meeting was controlled by proxy. The resolution was voted down.[7]

Denicke then tried to make his own investigation. His demands were referred to the Chickering office. They were evaded and then denied.[8]

The bank was acting against its interests in other matters at the same time. It appealed a judgment rendered in its favor in *Blum v. Fleishhacker*—a stockholder's suit

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[6]Conference was held with Thomson and Mr. Lamont of Chickering & Gregory. Lamont admitted that it would be impossible for him to "tell the directors that they were guilty of a violation of duty and to ask them for money"; said he was in no position to make such request. (R. 1506-1507.)

[7]Copy of such resolution appears in exhibit lodged on this appeal containing certified copies of certain papers from case entitled "Denicke v. Fleishhacker", District Court No. 21,161-R. It provided for a committee to examine records and report on the facts. Mr. Denicke would have held a minority position on such committee with power limited to the right to file dissenting report, if not satisfied with the inquiry.

[8]Chickering denied that information about directors' loans was "material" (R. 1558); said such request was not made in "good faith". (R. 1567.) We received a letter containing the following statement:

> "*The present management of the bank, at our suggestion,* has taken the position that what, if any, additional information your client is entitled to should be secured after court order." (Letter February 28, 1940—R. 1562.)

wherein Herbert Fleishhacker had been held for breach of trust in obtaining secret profits.

The Thomson management was requested to stop this activity. (R. 1569.) Thomson wrote, stating that Chickering had just "discovered" the appeal.[9] An explanation was demanded. (R. 1575, 1578.) There was no explanation.

Chickering reopened the discussions in July, 1940. Denicke was requested to approve compromise for a nominal amount. He refused. (R. 1507.)

Discovery was started. Routine information was obtained by depositions under Rule 26 FRCP. The bank was forced to answer interrogatories in April, 1941. (R. 191.)

Chickering then came forward with an offer of $350,000 —tendered for a general release. A petition was filed to compel acceptance. (R. 239.)

A special stockholders' meeting was held shortly afterward. Denicke desired to have a shorthand reporter in attendance. It was necessary to obtain a court order to make that arrangement. (R. 260.) At such meeting, the bank obtained a proxy vote in favor of general settlement.

The petition was heard in July 1941. Proof in opposition to settlement was limited to a prima facie case—

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[9]Thomson letter of February 29, 1940, states:

"The facts set forth in your letter had already come to the attention of our regular attorneys. The matter has now been placed in their hands and they will proceed to take whatever steps on behalf of the bank they deem advisable in the premises." (R. 1574.)

exact data not being available. (R. 1023, 1224, 1225.) That application was denied in January 1942. (R. 288.)

Discovery was resumed. The bank was ordered to permit examination of ledger cards and other records. (R. 298.) Chickering came forward with a second offer—this time for payment of $200,000 to discharge only claims joined herein.[10] The present appeal concerns that tender.

The bank filed a petition under Rule 23(c) FRCP. (R. 314.) An order to show cause issued. (R. 329.) Petitioners Denicke and Doble each filed objections. (R. 333, 340.)

The bank presented its case on the petition on March 31, 1942. It proved the adoption of resolutions authorizing settlement. The July, 1941 transcript was offered as an exhibit. (R. 1846.) Then counsel rested. (R. 1882.)

Petitioners moved for a nonsuit. (R. 1883.) The Court said no additional evidence was desired. (R. 1888.) Counsel were requested to submit the entire matter. After discussion, the Court *acted on its own initiative. The petition was continued to April 21, 1942, for further hearing.* (R. 1890, 1937, 392.)

There were five subsequent orders. Each postponed the petition to a date. *For three months, that petition was carried on the calendar awaiting trial.* In the meantime,

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[10]Tender of $200,000 in settlement of claims involved in case at bar. Petition filed March 19, 1942. (R. 314.) The first offer was $350,000 for the settlement of two cases. Pro rata for each was therefore about $175,000. The new petition revealed no real effort to obtain an adequate adjustment.

we carried on discovery. Depositions were taken at Portland, Los Angeles and San Francisco. An audit was completed. Denicke filed amended objections. (R. 403.) Everything was ready for trial. A report was at hand to show the loss, viz.:

	Directors' Loans	
George I. Cochran Corporation	$ 135,255.17	
George I. Cochran	22,188.59	
Sitka Spruce, Pulp & Paper Co.	296,950.39	
Pahrump Valley Company	31,404.86	
Paul Shoup	639,201.34	
R. Stanley Dollar	121,469.70	
Robert Dollar Company	30,559.45	
J. Harold & R. Stanley Dollar	150,854.27	
J. C. McKinstry	117,462.51	
William F. Humphrey	22,886.27	
James Tyson	53,488.37	
R. D. Brigham	5,306.83	
		$1,627,027.75
George Shima Account		1,108,648.17
Empire Farms Account		1,293,773.60
Total loss (R. 404)		$4,029,449.52

Then the Court reversed its position. It had acted on its own initiative in continuing the petition for a further hearing. It now overruled objections and granted the

petition without trial. It acted as on the overruling of a demurrer. Judgment was entered ex parte. (R. 458.)

Petitioners took immediate steps to set aside the decree. They filed:

Demand for a Trial (R. 464);
Motion to Vacate (R. 468);
Supporting Affidavit (R. 471);
Sworn Offers of Proof. (R. 481.)

Mrs. Doble protected her right to act as co-plaintiff. She filed:

Notice of Intervention (R. 466);
Motion for Intervention. (R. 532, Item 2.)

Discovery conducted in April-June, 1942, had clinched the liability. Petitioners acted jointly to avoid loss of rights:

Third Amended Complaint was lodged (R. 536, 537);
Motion for Leave to Amend was filed. (R. 532, Item 1.)

The testimony of *fourteen witnesses* had been protected by depositions under Rule 26 FRCP. We demanded the right to read this proof into the record. (R. 573.)

We also demanded cross-examination of witnesses involved in the settlement negotiations, viz.:

Bank officers. William H. Thomson (President), Allard A. Calkins (1st Vice President) and Paul E. Hoover (Vice President). (R. 573.)

Mortimer Fleishhacker. To compel disclosure of his conference with such parties.

RFC Officials. Emil Schram (former Chairman) and Sam H. Husbands (Director of RFC and of Anglo Bank) involved in the discussions. (R. 580.)

Interrogatories were propounded under Rule 31. These sought to establish transactions before suit. The following persons were named:

J. F. T. O'Connor (former Comptroller of the Currency) (R. 586);

Jesse Jones (former Chairman RFC) (R. 662);

Marriner S. Eccles (Chairman of Federal Reserve) (R. 680);

Leo T. Crowley (Chairman of Federal Deposit Insurance Corp.) (R. 684);

William F. Folger (Chief National Bank Examiner). (R. 693.)

These matters came up August 17, 1942. *The Court denied everything.* (R. 737.) Petitioners were not permitted to vacate—or amend—or read depositions into the record—or introduce an auditor's report—or conduct a cross-examination—or take depositions involving the settlement. *They were prevented from taking any of the steps essential to a fair trial.* The Court granted motions to suppress discovery. (R. 738, Items 1, 3.)

We took an appeal (R. 746) designating the documents filed after judgment. (R. 757-758.) These were excluded from the transcript. (R. 912.)

Proceedings in the Circuit Court.

It became necessary to enlarge the record. A motion for that purpose was granted by Circuit Judges Garrecht, Haney and Healy. (R. 1953.)[11]

The appeal was submitted to Circuit Judges Mathews, Stephens and Healy on February 15, 1944. (R. 1994.) Two weeks later an irregular opinion was filed by Judge Healy. The others refused to sign. (R. 2012.)

We requested reassignment in bank. (R. 2014, 2015.) We do not know whether such application was presented by the clerk, or withheld. It may have been considered. It may have been denied. The docket is incomplete. (R. 2061.)

We petitioned for rehearing in bank—requesting consideration of such petition, in bank. (R. 2015, 2017.) We do not know who considered that petition. Judges Mathews, Stephens and Healy denied it. (R. 2061.)

We moved to vacate the judgment, charging violation of Court rules. (R. 2005.) The same judges denied that motion. (R. 2060.) Judge Mathews said that it was "none of our business" whether the rules had been obeyed. (R. 2058.)

In applying for certiorari, we designated a true copy of the opinion, including the irregular signature clause. (R. 2070, Item 8.) The same judges signed an ex parte

[11]Judge Haney died before appeal was submitted on the merits. Judge Garrecht, who presided on argument of motion to enlarge, was eliminated from the panel by some process of reassignment not disclosed by docket entry. This left Judge Healy. Judges Mathews and Stephens were assigned to sit with him on the merits. These facts are of interest in view of impossibility of obtaining consideration on our application for reassignment in bank.

order to suppress that part of the record. (R. 2066.) A false record was transmitted to the clerk of this Court. The clerk of the Circuit Court certified that such record contained true copies of the originals. (R. 2078.)

We asked for a separately certified copy of the opinion. That document was a public record. The clerk refused to furnish it. We moved for an order. The same judges sat to deny that motion. Judge Mathews refused to entertain the motion. He adjourned Court—permitting no argument.

We come to this Court with a record disclosing failure of the Circuit Court to decide an appeal properly laid before it. In substance, our application to this Court constitutes a petition for appeal with respect to a matter where appellate review has not been granted.

SPECIFICATIONS OF ERRORS.

1. The Circuit Court violated petitioners' rights in making void entries on March 1, 1944. The decree, and all other proceedings noted on said date, should be set aside by the granting of a writ. (R. 1995, 1996, 2004.)

2. There was a denial of due process by the failure of the Circuit Court to decide this appeal—and by the failure of that Court to evidence such decision by an adequate opinion in writing signed by a minimum of two judges.

3. Petitioners were denied due process in the Circuit Court by the arbitrary conduct of Circuit Judges Healy and Mathews disclosed by the record herein.

4. The judgment (R. 458) is void because entered without trial.

5. Said judgment must be set aside under Rule 60b FRCP on the ground of mistake.

6. Said judgment is void because entered without findings.

7. The District Court committed error in refusing to admit the following proof, viz.:

Damage (R. 512, 516); financial responsibility (R. 521); character of liability (R. 545, 484); documentary proof involving directors (R. 490); depositions on file (R. 577, 580, 791, 845, 861, 867, 871); bad faith (R. 482, 522, 528); need for impartial negotiation. (R. 528.)

8. The motion for nonsuit of the petition should have been granted. (R. 1883.) Error was committed in failing to act on such motion.

9. The District Court should have permitted cross-examination of the following bank officers involved in settlement negotiations, viz.:

William H. Thomson, Allard A. Calkins and Paul E. Hoover. (R. 573.)

10. The District Court should have permitted petitioners to take the depositions of Emil Schram and Sam H. Husbands under Rule 26 FRCP. (R. 580.)

11. The District Court should have permitted petitioners to take the depositions of the witnesses O'Connor, Jones, Eccles, Crowley, and Folger, under Rule 31 FRCP. (R. 584, 661, 679, 683, 691.)

12. The District Court should have granted petitioners' motion for leave to file third amended complaint, together with motion of Mary E. Doble for leave to intervene. (R. 532, Items 1, 2.)

I.

Right to Vacate Void Entries in Circuit Court.

The Circuit Courts of Appeals were created by the Act of March 3, 1891. Congress granted:

> ". . . power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law. . . ." (26 Stat. 826, Chapt. 517, Sec. 3.)

The organization date was fixed by joint resolution.[12] Courts were opened simultaneously in all circuits. Associate Justice Field acted on behalf of this Court in organizing the Ninth Circuit. The ceremony was conducted June 16, 1891.[13] An original set of rules was adopted.[14] *For fifty-three years, practice in the Circuit Courts has been governed by rule.*

On November 30, 1936, the Ninth Circuit established a definite procedure for the rendering of an opinion. We quote from that rule:

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[12]Joint resolution of March 3, 1891 fixed the third Tuesday in June 1891, for the first meeting of the several Circuit Courts of Appeals.

[13]Vol. 1 Minutes (CCA 9) page 1, describes ceremony conducted by Associate Justice Field with Circuit Judge Lorenzo Sawyer, and attended by members of the bar and others.

[14]Uniform set of rules was adopted in all circuits. Minor differences which now exist, are the result of amendment. See 47 Fed. page iii.

> "Appeals shall be deemed decided when announced from the bench in a session of the court at the place of the term in which they are submitted, *or when the signed opinions or other documents evidencing their decision are filed with the clerk.*" (CCA Rule III.)

A document evidencing that amendment was signed by all members of the Court, and duly filed. A copy thereof appears at page 5 of our Petition.

This is the rule which has been violated. The Circuit Court assumed that petitioners had no standing to insist upon compliance. We address ourselves to that question:

Effect of the rule. This amendment prescribes a method whereby two or more judges may render a decision so as to make it binding as the act of the Court. Ordinarily three judges (who are a minority) sit in a particular case. The rule is essentially a *special power of attorney.* It limits the authority of those assigned. It prescribes a method which must be followed if their conduct is to have legal effect.

Power to disregard. Since such amendment was adopted by the signatures of *all judges,* it can be abrogated only with an act of equal dignity. It constitutes a covenant by each judge, made with his associates, for the protection of litigants. On no theory could a violation be condoned by less than a majority.

By law the Circuit Court has a membership of seven. One vacancy was created by death.[15] A minimum of four

[15]Circuit Judge Haney died September 1943—about 6 months before this case was submitted—vacancy remained unfilled. Court had actual membership of six while appeal was pending.

judges would be required to approve the action disclosed on this appeal.

Substantial rights. The rights of litigants are involved in this rule. It fixes the time for certiorari, and for rehearing. It governs issuance of the mandate. It prescribes the duty of the clerk with respect to the entry of judgment and allowance of costs. *In fact, it determines what acts are required to constitute a decision of the Circuit Court.* In view of their interest in the subject matter, petitioners had standing to set aside these entries on motion.

Rules of Court have the effect of law. A litigant is entitled to apply for enforcement. See:

Weil v. Neary, 278 U.S. 160 at 169;

Rio Grande Irrigation Co. v. Gildersleeve, 174 U.S. 603 at 608.

The rule is summarized in *Matter of Giannini, Inc.,* 90 Fed. (2d) 445 at 447, as follows:

> "The cases cited by the Supreme Court in the Neary case for the proposition that an authorized rule of court has the force of law are to the effect that the rule must be applied until repealed by the authority making it; *and hence that a single judge cannot waive a rule not his own.*"

II.

Duty to Render Opinion—Duty to Sign It.

Several distinct questions are presented, viz.:

1. Duty to render a decision in writing;

2. Duty to include in such decision, a sufficient statement to disclose the action taken upon each substantial question raised on appeal;

3. Duty to support such decision by signatures.

It is impossible to deny the duty to decide an appeal. This follows from the jurisdiction conferred by act of Congress (28 USCA 225), and from the principles announced by Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 at 403.[16]

This requires a decision *of the entire case.* There is no right to decide one part and ignore the rest. Such conduct would amount to a violation of duty. Where the failure to pronounce judgment is flagrant, it will amount to a denial of due process.

Where a general custom prevails in a particular Court —that custom must be followed. It is improper to refuse an opinion to one litigant, when it is the settled practice to render such opinions for the benefit of others.

At the outset, we distinguish between the duty to write an elaborate opinion or legal treatise, and the duty to furnish some written decision on appeal. We stand upon our right to a document sufficient to disclose the action of the Court. We insist upon the right to some memo-

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[16] "The judiciary cannot, as the legislature may, avoid a measure. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." (19 U.S. 403.)

randum or other writing equivalent to the findings of fact and conclusions of law required of a District Court under Rule 52a FRCP.

In the Ninth Circuit there is a settled practice. All cases are decided by written opinion. Rule 24 of that Court requires the preservation of such opinions for permanent record. A similar requirement was established by the original set of rules adopted in all circuits. (See 47 Fed. xii, Rule 28.) We also have an express requirement for a written opinion supported by signature.

> "Appeals shall be deemed decided . . . when the signed opinions or other documents evidencing their decision are filed with the clerk." (CCA Rule 3—9th Circuit.)

The importance of adequate opinion-writing has been recognized by many leaders of the bench and bar.

> ". . . It is the practice of the Supreme Court to hand down opinions in writing which are summarized orally from the bench by the judges who have written them for the Court. The practice of fully stating the case in the opinion has contributed in no slight degree to the influence and prestige of the Supreme Court.
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> While terseness is a virtue too often lacking in judicial opinions, there is no better precaution against judicial mistakes than the setting out accurately and adequately the material facts as well as the points to be decided. The method of the Supreme Court is an example to other courts of the country. . . .
>
> Jefferson thought there should be a rule requiring the judges to announce seriatim their opinions

in each case, and thus in a responsible manner take their position. Let every judge, said he, 'throw himself in every case on God and his country; both will excuse him for error and value him for his honesty'. This practice would be impracticable, but *the importance of written opinions as a protection against judicial carelessness and irresponsibility is very great,* and no just complaint can be made that the Supreme Court has failed to maintain this safeguard."[17]

We seek to enforce our right to an adequate memorandum opinion or other document disclosing the action taken on appeal. That right can be reconciled with the need for controlling the size of judicial opinions.

"One may ask why write an opinion at all in cases which involve only questions of law, which are well settled, and thus add to the volume of legal literature material which is of no real value from the point of view of legal history and scholarship. *A partial answer is, of course, that litigants and their counsel are entitled to know the reasons for the decisions of the court.* There is no reason, however, why both would not be willing to have these reasons given in concise memorandum form, and it is quite possible to prepare the memorandum in such form that it would accomplish its purpose, without giving to it any value or influence as a precedent."[18]

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[17]The Supreme Court of the United States—Charles Evans Hughes (Columbia University Press), pages 64-65.

[18]Law and Its Administration—Harlan F. Stone (Columbia University Press, 1924), page 213.

The American Bar Association has published an exhaustive report on this subject.[19] We quote therefrom:

> "There are dangers to be guarded against in the use of memorandum opinions. This kind of medicine could be worse than the condition it is intended to alleviate . . . The bar has criticized administrative tribunals largely because of too much use of methods similar to the memorandum opinion method. This idea was expressed by Professor Felix Frankfurter (in 1938 before he became a Supreme Court Justice) at an American Bar Association conference on 'Functions and Procedure of Administrative Tribunals', saying: '*Those who decide should record their judgments and give reasons for them,* which in itself will have a fruitful psychological effect. *You feel much more responsible—all of us do—if we have to sit down and write out why we think what we think*'.
>
> The practice in most courts still is to write complete opinions in every case, with statement of facts, issues and reasons for the decision. No doubt lawyers and litigants feel that their cases are given fuller consideration when this is done. *This is fundamental in retaining the confidence of the people in their courts and should not be lightly disregarded.*" (Am. Bar Committee Rep., p. 22.)

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[19]Report entitled "Methods of Reaching and Preparing Appellate Court Decisions"—published by Judicial Section of Am. Bar Assn.—delivered at annual meeting held August, 1942. The committee consisted of:
Laurance M. Hyde, Commissioner of Missouri Supreme Court;
James P. Alexander, Chief Justice of Texas;
William Denman, Circuit Judge—9th Circuit;
Orie L. Phillips, Senior Judge—10th Circuit;
Royal A. Stone, Justice of Minnesota Supreme Court.

Recently, a committee of the American Bar Association rendered a report concerning standards required in administrative hearings. A tentative bill has been drawn. It is significant that this includes provision for decisions in writing. We quote Section 7(e) thereof:

> "*Findings and Opinions.* All final decisions and determinations, whether of subordinate officers or initially upon review by the ultimate authority within the agency, shall be stated in writing and accompanied by a statement of reasons, findings of fact, and conclusions of law upon all relevant issues raised including matters of administrative discretion as well as of law or fact. The findings and conclusions shall encompass all relevant facts of record and shall themselves be relevant to, and adequately support, the decision and order or award entered."[20]

Importance of Circuit Court Jurisdiction.

The Circuit Courts exercise a jurisdiction whose importance is not equalled by any tribunal except this Court. It includes power to review final judgments from District Courts in forty-eight states and in the territories. (28 USCA 225.) Such Courts also review judgments and orders from important agencies, viz.:

> Bituminous Coal Division (Dept. of Interior); Federal Power Commission, Civil Aeronautics Authority, Federal Alcohol Administration, Federal Communications Commission, Federal Security Agency, Federal Trade Commission, National Labor Relations Board, Processing Tax Board of Review, Secretary of Agriculture, Securities and Exchange Commission,

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[20]Federal Administrative Procedure Act—proposed by American Bar Association. March 1944. See Am. Bar Jour. issue of April, 1944, page 228.

Tax Appeals Board, Wages and Hours Administration.

The Circuit Courts have become Courts of last resort in ninety-five per cent of all cases.[21] Certiorari is intended to cover limited subjects. (Rule 38.) In common law and diversity cases the Circuit Court is, to an even greater extent, the Court of last resort.

Administrative agencies are required to make adequate findings. So are the District Courts. (Rule 52a FRCP.) Strict compliance is enforced. *The opinion of a Circuit Court constitutes the finding of that Court. Its opinion must measure up to the standards required of all other Courts.*

This Court cannot give proper attention to certiorari matters without adequate opinions. There is no other way to pass upon the number of petitions filed annually. If loose standards are permitted it will be necessary to go back to the record in every case. *The burden of work that should be carried in ten circuits, will fall upon the shoulders of one Court.*

Duty to sign opinion. This obligation is clear. A rule of Court so provides. It is a rule designed to prevent irresponsible action by a clerk during adjournment. It is intended to assure litigants that judgments so entered, are in fact the judgment of the Court. Disregard of that rule violated a substantial right.

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[21]Report of Will Shafroth, Chief of Division of Procedural Studies and Statistics. Published in Annual Report of Director of Administrative Office of U. S. Courts (year 1941), page 45.

III.

Reversal for Failure to Make Findings.

The District Court did not pretend to comply with Rule 52a FRCP. It filed an order "overruling" objections to a settlement. (R. 438.) A judgment was signed and filed ex parte. (R. 458.) This contained a general recital in favor of the bank.[22] It disclosed a refusal to find, even by *recital,* on the issues raised by objection.[23] There was an opinion containing a general discussion of the case. (R. 440.) This was indefinite. Under the decisions of this Court, it was not equivalent to findings required by Rule 52a FRCP.

Factual issues were raised by objections. The following matters should have been settled:

Amount of damage (R. 335; 342; 404);

Persons involved (R. 409);

Nature and extent of primary liability (R. 406-409);

Financial responsibility (R. 421);

Collusion involving settlement negotiations (R. 336, Item 8, 343, 422-424);

Facts supporting derivative status and right to control the litigation (R. 333, Item 2; 426, Items 1 and 2);

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[22]Judgment states "that said defendant Anglo Bank and its representatives in filing said petition have acted in good faith and for the best interests of said Anglo Bank and its shareholders. . . . That it is for the best interests of the defendant Anglo Bank and its shareholders that the above entitled action be dismissed." (R. 459-460.)

[23]Recital in the judgment discloses a refusal to find on issues raised by objection. "The only objections filed to said petition were those of the plaintiff, Ernest H. Denieke and Mary E. Doble, a shareholder, both being represented by the attorney for the plaintiff; *that all of said objections are without merit.*" (R. 459.)

Facts showing want of capacity in bank to maintain a petition. (R. 334, Item 5; 341, Item 4; 427, Item 6.)

The District Court refused to comply with the following decisions of this Court:

Mayo v. Canning Co., 309 U.S. 310 at 316;[24]

Interstate Circuit, Inc. v. United States, 304 U.S. 55 at 56;[25]

Kelley v. Everglades District, 319 U.S. 415 at 420 (composition plan arising in bankruptcy);

Securities and Exchange Commission v. Chenery Corporation, 318 U.S. 80 at 94 (review of an order involving merger of utilities);

Consolidated Rock Products Co. v. DuBois, 312 U.S. 510 at 525 (reorganization under 77B);

Wichita Royalty Co. v. City National Bank, Wichita Falls, 306 U.S. 103 at 110 (equity matter).

Petitioners were entitled to enforce compliance with Rule 52a FRCP and with these decisions.

The Circuit Court violated its duty in sanctioning this flagrant disregard of precedent. This error raises a question of paramount importance, viz.: Duty to maintain

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[24] "The observations made in the course of the opinion are not, in any proper sense, findings of fact upon these vital issues. Statements of fact are mingled with arguments and inferences for which we find no sufficient basis either in the affidavits or the oral testimony."

[25] "The opinion of the Court was not a substitute for the required findings. A discussion of portions of the evidence and the Court's reasoning in its opinion do not constitute the special and formal findings by which it is the duty of the Court appropriately and specifically to determine all the issues which the case presents. This is an essential aid to the Appellate Court in reviewing an equity case. . . ."

precedents, and the duty to enforce compliance therewith. We cite the opinion of Justice Roberts in ***Mahnich*** *v. Southern Steamship Co.* (Oct. Term 1943, No. 200):

> "The evil resulting from overruling earlier considered decisions must be evident. In the present case, the court below naturally felt bound to follow and apply the law as clearly announced by this Court. If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them. Counsel and parties will bring and prosecute actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard. Defendants will not know whether to litigate or to settle for they will have no assurance that a declared rule will be followed. But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy."

It is a serious matter to permit disregard of precedent. This is particularly true where the subject concerns enforcement of adequate procedure in lower Federal Courts which are directly under the supervision of this Court.

> "I can not believe that any person who at all values the judicial process or distinguishes its method and philosophy from those of the political and legislative process would abandon or substantially impair the rule of *stare decisis*. . . . To overrule an important precedent is serious business. It calls for sober appraisal of the disadvantages of the innovation as

well as those of the questioned case, a weighing of practical effects of one against the other."[26]

The Circuit and District Courts are bound by the precedent. The duty to follow such rulings is absolute. See,

California Water Service Co. v. City of Redding, 304 U.S. 252.

There is only one brand of law. It applies equally to all litigants. Petitioners were entitled to invoke the jurisdiction of the Circuit Court. It was the duty of that Court to follow decisions of this Court. For a violation of that duty, a writ should issue.

IV.

Reversal of Judgment Entered Without Trial.

The District Court did not pretend to grant a hearing. It *overruled* objections. It entered a judgment *ex parte.* This decree was void on its face. Where such error is shown there is prejudice as a matter of law. Reversal is mandatory. See:

Alford v. United States, 282 U.S. 687 at 692;
Brassfield v. United States, 272 U.S. 448.

This Court has jealously guarded the rights of persons subjected to judgment without trial.[27] In civil and criminal

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[26]Address delivered by Honorable Robert H Jackson before annual meeting of American Law Institute at Philadelphia—May 9, 1944.

[27]*Powell v. Alabama,* 287 U.S. 45; *Norris v. Alabama,* 294 U.S. 587; *Morgan v. United States,* 304 U.S. 1; *Johnson v. Zerbst,* 304 U.S. 458; *Bruno v. United States,* 308 U.S. 287; *Avery v. Alabama,* 308 U.S. 444; *Smith v. Texas,* 311 U.S. 128; *Smith v. O'Grady,* 312 U.S. 329; *Hill v. Texas,* 316 U.S. 400; *Ward v. Texas,* 316 U.S. 547.

proceedings there is the same right to due process of law. We cite:

Glasser v. United States, 315 U.S. 60 at 69-70.

"The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. . . . A federal court cannot constitutionally deprive an accused . . . whose life or liberty is at stake, of the assistance of counsel. . . . The Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired." (315 U.S. 69-70.)

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart . . . is at once difficult and unnecessary. *The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.*" (315 U.S. 75-76.)

A writ should issue to secure petitioners' right to a trial—as guaranteed by the Bill of Rights.

V.

Right to Vacate Decree on the Ground of Mistake.

The District Court had no discretion under Rule 60(b) FRCP. We quote:

"On motion the court, upon such terms as are just, may relieve a party . . . from a judgment, order, or proceeding taken against him through his mistake . . . surprise, or excusable neglect."

The "discretion" granted by that rule was governed by the due process clause of the Fifth Amendment. There was a conclusive showing of prejudice, accompanied by a reliance upon minute entries made by the District Court acting on its own initiative. This error requires issuance of a writ.

VI.

Standards Governing Approval of a Settlement Under Rule 23(c) FRCP.

There is no essential difference between the rule recognized in Chandler Act cases, and the principles which should apply to the compromise of a stockholder's suit. We cite the opinion of Justice Brandeis in *National Surety Co. v. Coriell*, 289 U.S. 426:

> ". . . *Creditors were entitled to have the plan and their objections considered in an orderly way and to a decree based on adequate data.* The district court had before it, in support of the plan, only informal, inadequate and conflicting ex parte assertions unsupported by testimony. It undertook to pass upon the wisdom and fairness of the plan of reorganization, and the rights of non-assenting creditors.
>
> For the proper disposition of these questions *definite, detailed, and authentic information was essential.* Such information was wholly lacking. . . . There was no valuation of the assets by a disinterested appraiser; no account of the operations; . . . and no dependable schedule of liabilities of the corporation showing the number of creditors, the amount owed to each and the collateral held . . .
>
> The failure to require relevant data before deciding whether the plan should be approved was not

cured by the declaration of the Circuit Court of Appeals that the dissenting creditors were entitled to an aliquot share of what, a year later, it might be estimated the property would have brought at a public sale. . . .

Every important determination by the court in receivership proceedings calls for an informed, independent judgment." (289 U.S. 435-436.)

The rule was restated in *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106:

"*We think that as a matter of law the plan was not fair and equitable.* . . . Where a plan is not fair and equitable as a matter of law, it cannot be approved by the court even though the percentage of the various classes of security holders required by Sec. 77B(f) for confirmation of the plan has consented . . .

The court is not merely a ministerial register of the vote of the several classes of security holders. All those interested in the estate are entitled to the court's protection. Accordingly, the fact that the vast majority of the security holders have approved the plan is not the test of whether the plan is a fair and equitable one.

The contrary conclusion in such cases would make the judicial determination on the issue of fairness a mere formality and would effectively destroy the function and the duty imposed by Congress on the District Courts under Sec. 77B.

Submission to coercion is not the application of 'fair and equitable' standards. Such a proposition would not only drastically impair the standards of 'fair and equitable' as used in Sec. 77B; it would pervert the function of that Act." (308 U.S. 114, 115, 123.)

We also cite:

Consolidated Rock Products Co. v. DuBois, 312 U.S. 510;

Securities and Exchange Commission v. United States Realty & Improvement Co., 310 U.S. 434;

Kelley v. Everglades District, 319 U.S. 415.

In the Sixth Circuit, a similar rule was applied to a proceeding under Rule 23(c) FRCP. See,

Cohen v. Young, 127 Fed. (2d) 721,

where the Court said:

> "Rule 23(c) does not justify approval of a proposed compromise of a class action solely upon the recommendation of attorneys even though they represent all parties of record. The rule provides for notice to stockholders not only in order that they may have the right to be heard but also in order that the court may have the benefit of that broader information which comes from receiving advice as to the views of all parties concerned and from considering evidence proffered by them upon the relevant points of the case. In other words, the rule was adopted to secure not routine approval of a consent decree, but in order to insure supervision of the court for the protection of the corporation and all the stockholders." (127 Fed. (2d) 725.)

The Court held that evidence to sustain a settlement should be put into the record—that the district judge was bound to consider available proof before passing upon the plan:

> "*The documents relied upon by the attorneys should have been incorporated in the record.* The appellant had a right to invoke the discretion of the court to decide whether the compromise recom-

mended did in fact protect the interest of the corporation and of the stockholders." (127 Fed. (2d) 725.)

"It was the duty of the court to consider the available evidence in this light, and its refusal or failure to consider it on the ground that it had no power or discretion so to do deprived appellant of a substantial right." (127 Fed. (2d) 725.)

In the Ninth Circuit, the approval of a settlement has been left to the uncontrolled discretion of a district judge. A writ should issue to correct the miscarriage of justice which has resulted.

VII.

Right to a Nonsuit of the Petition.

Our case is controlled by the decision of this Court in *Delaware & Hudson Co. v. Albany & Susquehanna Railroad Co.*, 213 U.S. 435, where Justice McKenna laid down the following rules:

"There was no compliance with the requirements of Rule 94, as expressed in its letter . . . The bill seemed to show a case not of compliance with the requirements of Rule 94, but circumstances which excused from such compliance." (213 U.S. 449.)

"The situation was unique. The company whose interest it was to assert the right to payment and to demand it was under the control or could be influenced by the company whose interest it was to deny indebtedness and resist payment. . . . It was certainly natural enough that a stockholder should seek more earnest representatives . . ." (213 U.S. 451.)

And in *Doctor v. Harrington*, 196 U.S. 579, this Court held that a corporation made defendant in a derivative suit must be aligned to conform with its conduct; that it will be treated as a real defendant where acting against the interests of its stockholders. We quote from the opinion of Justice McKenna in that case:

> "The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words, his interests, and the interests of the corporation, may be made subservient to some illegal purpose. If a controversy hence arise . . . it can be litigated in a federal court." (196 U.S. 587.)

Modern conditions have given these opinions more significance. A meeting of stockholders is no longer a democratic affair. It is not attended by men who are the owners of the business. The stockholders do not gather as in a New England town meeting. Large blocks of stock are voted by proxy. Ownership (held by stockholders) has been divorced from actual control (as held by management). The managing officers of most concerns have little or no investment at stake. Their principal interest lies in salaries and continuance of their employment. These changes are significant. The public is greatly concerned over that problem today.

> "The shareholder in the modern corporate situation has surrendered a set of *definite rights* for a set of *indefinite expectations*. The whole effect of the growth of powers of directors and 'control' has been steadily to diminish the number of things on which a shareholder can count; the number of demands

> which he can make with any assurance that they must be satisfied . . . *The shareholder is therefore left as a matter of law with little more than the loose expectation that a group of men, under a nominal duty to run the enterprise for his benefit . . . will actually observe this obligation. . . .*"[28]

A corporation is a legal fiction. The law is not interested in sophistry. It regards the conduct of the men in control.

> "Frequently lawyers' fictions . . . are employed as a screen to cover up a retreat. To regard a giant corporation, with its stockholders, directors and employees, as a single person is a useful and convenient fiction to enable the corporation to sue and be sued as simply as any individual; but to maintain that a worker dealing with his corporation is dealing simply with another individual like himself is to pervert a fiction as only a legal mind could do with solemnity."[29]

Stockholders are widely scattered. A dangerous condition has been created.

> "The wide distribution of stock, instead of being a blessing, constitutes, to my mind, one of the gravest dangers to the community. It is absentee landlordism of the worst kind. . . . Such a wide distribution of the stock dissipates altogether the responsibility of stockholders, particularly of those with five shares, ten shares, fifteen shares, or fifty shares. They recognize that they have no influence in a cor-

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[28]The Modern Corporation and Private Property—Berle & Means, pages 277, 278.

[29]The Struggle for Judicial Supremacy—Robert H. Jackson (Alfred A. Knopf, 1941), pages 293-294.

> poration of hundreds of millions of dollars capital. Consequently they consider it immaterial whatever they do, or omit to do; the net result is that the men who are in control become almost impossible to dislodge, unless there should be such a scandal in the corporation as to make it clearly necessary for the people on the outside to combine for self-protection."[30]

There has never been a time when a sense of trusteeship was more important.

> "Responsible management has always recognized its position as the servant of the stockholders. Yet the blight of capitalism has been a specious brand of morality for corporations, a morality which drew a distinction between the allegiance which the management demanded of its staff and the allegiance which the management owed to its stockholders. There can be no such distinction. Once capitalism forsakes the standards of trusteeship, it bids fair to destroy itself."[31]

There has never been a time when investors were more in need of the protection afforded by a Court of Equity. The rule in the *Delaware & Hudson* and *Harrington* cases should be extended.

The District Court committed flagrant error in failing to act on the motion for nonsuit. We submit that such motion should have been granted; and that this error requires issuance of a writ.

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[30]Statement of Louis D. Brandeis before Commission on Industrial Relations of 64th Congress, 1st Session, printed in Senate Document, Vol. XXVI P. 7661 (1915).

[31]Democracy and Finance—William O. Douglas, page 56.

VIII.

Duty to Follow Local Decisions Recognizing Property Right Sufficient to Support Derivative Suit.

The Circuit Court and the District Court treated petitioners as having no greater right than that held by a guardian *ad litem*. The bank was allowed to supplant them by filing a petition. There was a flagrant refusal to follow local decisions which are controlling. We cite:

Klopstock v. Superior Court, 17 Cal. (2d) 13 at 16, 17, 108 Pac. (2d) 906 (decided Jan. 10, 1941, where the Court said:

> "A stockholder's representative suit has been called a 'derivative action' for the reason that the wrong to be redressed is one against the corporation, and normally the corporation would bring the suit. Where, however, the corporation fails or refuses to act after proper demand, the stockholders' ultimate interest in the corporation is sufficient to justify the bringing of a 'propulsive' action, designed to set in motion the judicial machinery for the redress of the wrong to the corporation . . .
>
> If the stockholder dies, the legal representative of his estate obtains the authority and powers of the stockholder during the time of administration, including the possession and control of the property . . . and may sue in his stead on causes of action which the deceased stockholder had at the time of his death . . .
>
> Thus, in the original action, the suit on behalf of the corporation should have been brought by the legal representative of the deceased stockholder . . . and neither a legatee nor anyone representing the

> legatee . . . was entitled to bring the derivative action to redress the wrong to the corporation, prior to the actual distribution of such shares to the legatees' estate.
>
> *It is contended that this defect was merely one of lack of capacity to sue . . . We do not believe that this accurately states the nature of the defect. If it were lack of capacity to sue, the defect would have been waived by a failure to demur to it specially* . . . A demurrer for lack of capacity to sue raises only the question of whether the plaintiff is free from general disabilities, such as infancy or insanity, or if he sues in a representative capacity, that he actually possesses the character in which he sues."

We also cite *Eggers v. National Radio Co.*, 208 Cal. 308, at 313-314, 281 Pac. 58 (decided Sept. 30, 1929), where the Court said:

> " '. . . where a corporation refuses to defend an action, or, having begun a defense, it is made to appear that the corporation will not press it in good faith, a stockholder may, upon a proper application showing the facts, be allowed to become a party and defend on behalf of the corporation, but he must show that he cannot induce those in control to do that which is fair and right.' (Difani v. Riverside Oil Co., supra; Favorite v. Superior Court, 181 Cal. 261, 8 ALR 290, 184 Pac. 15.) The requirement that a demand must be made upon the board of directors to defend, or continue the defense, of an action pending against a corporation is not a necessary prerequisite to an intervention by the stockholders where, as here, the facts alleged in the complaint in intervention are such as to render such a request useless . . .

> The peculiar nature of this action and the failure of the corporation defendant to defend against it, after having secured an order granting a new trial . . . are such, in our opinion, as to make this a proper case for an intervention by those stockholders opposed to the passive stand of the governing body of the corporate entity. . . .
>
> In such case, and particularly when the corporation neglects and fails to defend against the plaintiffs' claim, 'there can be no doubt of the right of a stockholder to intervene'. (Shively v. Eureka Min. Co., 123 Cal. 293.) It would be a reproach to the law if the stockholders in such a case as this were remediless."

A guardian *ad litem* acquires his status by an order of Court. He is subject to removal. He may be supplanted whenever a new guardian is put in. His death transfers nothing to his executor, or to his estate. He acts for a third party—not for himself.

A plaintiff shareholder occupies a different position. He represents *himself*, and *all others similarly situated*. He has a dual status. His rights pass, on death, to his executor and to his estate. The corporation has no right to supplant him by any act on its part. The Court has no power to remove him.

The Circuit Court misapplied the rule in *Erie RR Co. v. Tompkins*, 304 U.S. 64. The bank could only obtain realignment by complying with Federal Rules of Civil Procedure. It should have answered under Rule 12(a) —and then stood trial on the facts governing derivative status.

The bank has consistently refused to plead. It has drifted from one position to another—throughout the course of the litigation. At times it pretended to be a "nominal defendant" with the rights of a plaintiff; on other occasions it would act like a defendant in order to resist investigation into its conduct.

IX.

Right to Amend and Intervene.

Within ten days of entry of the ex parte decree, petitioners lodged a third amended complaint with motion for leave to file. (R. 536, 537, 532, Item 1.) This sought to protect liability on the facts developed by discovery, viz.:

Actual damage—stating a loss exceeding four million dollars. (R. 549, 555, 557.)

Derivative facts—a specific statement of the facts bringing this matter within the *Delaware & Hudson* and *Harrington* cases. (R. 560-569.)

Extent of directors' liability—provision for allocation among parties joined. (R. 545, 555, 559.)

Shima account—statement of facts in accordance with depositions taken at Portland, Los Angeles and San Francisco. (R. 546-549.)

Empire Farms account—restatement of the facts supporting liability. (R. 549-555.)

Directors' loans—exact statement of the amount, with facts showing liability therefor. (R. 555-560.)

Prior pleadings had been in skeleton form. The original complaint was amended to meet an attack on the jurisdiction. (R. 926, Item 10.) The second amended complaint (R. 6) was filed when defendants moved to dismiss for failure to state a claim. (R. 932, Item 84.) A skeleton amendment to protect the case on directors' loans was filed February 20, 1942. (R. 290.)

Petitioners were never able to file a pleading containing the facts developed by discovery. They were impeded at every step by conduct of the bank. Ledger cards and material documents were suppressed. It was necessary to use discovery first and amend afterwards.

Mrs. Doble sought to intervene (R. 466), to protect her right to act as co-plaintiff. In denying amendment and intervention, the District Court violated rights essential to a fair trial. The right to a hearing carries with it, the right to file a pleading setting forth the matters which are to be presented.

X.

Right to Cross-examine Bank Officers Who Handled the Negotiations.

This settlement was the result of conferences between Chickering & Gregory and bank officers—particularly William H. Thomson (president), Allard A. Calkins (1st vice president), and Paul E. Hoover (vice president). We demanded the right to cross-examine them in open

Court.[32] Their testimony would have covered the following data assembled while objections were on the calendar awaiting trial, viz.:

Misrepresentation of the loss. The settlement appeared to be an adjustment at roughly fifty per cent. Actually, it represented five cents on the dollar. *The misrepresentation amounted to three million six hundred thousand dollars.*[33]

Suppression of Documents. The bank files contained seventy-five letters of complaint received from the Comptroller of the Currency before suit. In July, 1941, Chickering had denied the existence of such evidence. We were entitled to expose the persons responsible for that fraud.[34]

Disqualification of bank counsel. For three years the bank had insisted upon handling negotiations through

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[32]Demand filed August 8, 1942 (R. 573); denied by Minute Order August 17, 1942. (R. 737 at 738, Item 6.)

[33]It is necessary to guess at the loss assumed by the District Court. The opinion, which is quite vague, suggests a loss of $421,601.64 on the Empire Farms account—no loss on Shima loans—and no mention of any damage on loans extended to directors. (See R. 446.) $200,000 was tendered in settlement, which would be roughly fifty per cent of the write-off on the Empire Farms account. Our audit completed in May, 1942, fixed the actual loss at $4,029,449.52. (R. 404.) Thomson, Calkins and Hoover had access to the ledger cards disclosing this fact. It was proper to determine why this vital fact was not revealed to the District Court.

[34]In July, 1941, Mr. Williams, of the Chickering office, denied in open Court, that the bank had any letters from the Comptroller other than those already furnished under process. (R. 1687-1688.) On March 30, 1942, we obtained a Court order compelling production of seventy-five separate letters of that kind. (R. 365 at 367-380.)

counsel who had acted in the defense of directors and executive committee members joined in this suit. It had become proper to inquire into that situation. The representation of conflicting interests is contrary to the most elementary concept of professional ethics.

> "It is unprofessional to represent conflicting interests, except by the express *consent of all concerned* given after a full disclosure of the facts. Within the meaning of this canon a lawyer represents conflicting interests *when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.*" (No. 6 of Canons of Professional Ethics of Am. Bar Assn.)

Such conduct has been condemned in reorganization matters:

> ". . . Where a house of issue has undertaken to discharge its 'moral obligation' to security holders by forming a protective committee, we often find its counsel has become counsel to the committee. . . . We frequently see that one of the grave risks of the bankers is that security holders may sue them in fraud . . . Bankers in control of a committee may be able to suppress or thwart such attempts . . .
>
> The officers and directors may be legally responsible to the corporation for their wrongful acts . . . From the selfish viewpoint of the management it will be desirable to have any investigation or suit stifled. The lawyer in this dual position cannot serve both masters with undiluted loyalty.
>
> It is disturbing to see this condition . . . It is a danger sign to all those who are genuinely interested in preserving capitalism. It is a particularly danger-

ous trend because the lawyers, who are officers of the court, not only participate in it; they are at times its guiding and controlling influence . . . They are willing not only to become, as Mr. Justice Stone has said, 'the obsequious servant of business', they have neglected the element of public trust inherent in their profession."[35]

Disclosure made in Circuit Court.

Chickering filed a reply brief on behalf of the bank. This revealed that negotiations for a settlement had never been conducted with any one *except two attorneys* who represented only *three of the defendants.*[36]

The others, *comprising a group of twenty solvent parties,* had received the equivalent of immunity.

A former Chickering client—Executive Committeeman Willard O. Wayman—had gone around to receive "voluntary contributions".[37]

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[35]Democracy and Finance—Douglas, pages 234, 235, 239.

[36]Reply Brief filed by Chickering in Circuit Court contains the following statement:

"No negotiations have ever been conducted by bank's counsel with said defendants or their representatives in so far as their liabilities are concerned. The only negotiations conducted by Messrs. Chickering & Gregory with any of the defendants in said case were those with Mr. Mortimer Fleishhacker, Mr. Herbert Fleishhacker and Mr. Mortimer Fleishhacker, Jr., and their attorneys." (R. 2036.)

"It is difficult to see what possible bearing the former representation of Messrs. Chickering & Gregory of certain of the defendants in this case can have upon the matters before this Court." (R. 2037.)

[37]Chickering Brief in CCA states:

"The sum of $50,000, offered in compromise by attorney John C. Altman was raised through the efforts of Mr. Willard O. Wayman." (R. 2037.) The total liability exceeded $4,000,000—hence, this "contribution" was less than one per cent for a group of twenty directors.

XI.

Right to Take Depositions of Witnesses Schram and Husbands Under Rule 26 FRCP.

Petitioners demanded the right to cross-examine the witness Emil Schram with respect to the following letter (R. 580 at 582):

"Reconstruction Finance Corporation
Washington

Emil Schram
Chairman of the Board

Oct. 19, 1939

Mr. Aaron Sargent
Hobart Building
San Francisco, California.

Re: Anglo California National Bank
San Francisco, California

Dear Sir:

Replying to your letter of October 13th, I wish to advise that *it is the policy of the Reconstruction Finance Corporation to refrain from interfering in the detail operation of a bank whose preferred stock it owns.* If management of such a bank is unsatisfactory, this Corporation uses any right it has to try to bring about necessary corrections.

In view of the changes in management of the subject institution which have recently been made, we feel that its *operations are in the hands of a board of directors and chief executive officer, who are using their best efforts to protect the interests of all stockholders.*

Yours very truly,
Emil Schram
Chairman." (R. 582.)

The witness Sam H. Husbands was a director of RFC and also a director of the bank. Thomson consulted with him before "approving" the settlement. (R. 773.) We sought to examine him under Rule 26 FRCP. (R. 580.)

Demands for the testimony of both witnesses were denied August 17, 1942. (R. 738, Item 5.)

XII.

Right to Take Depositions of Federal Officials Under Rule 31 FRCP.

Interrogatories were propounded to J. F. T. O'Connor, Marriner S. Eccles, Leo T. Crowley, William F. Folger and Jesse Jones. (R. 584, 680, 684, 693 and 662.) These were filed to establish transactions before suit. That proof was material on several grounds, viz.:

1. To establish the flagrant character of the liability.

2. To show that the bank's representatives had knowledge of the guilt of the parties to be released.

3. To compare an apparent failure in law enforcement before suit—with a failure to enforce liability after suit.

Interrogatories to J. F. T. O'Connor.

Witness was Comptroller of the Currency—1933-1938 inclusive. The following testimony was sought:

Conditions at Anglo Bank in May, 1933—persons having knowledge thereof. (R. 589.)

Similar condition in March, 1934—persons affected. (R. 596.)

That complaint was lodged with directors on May 1, 1935, which included reference to

> "The undesirable asset condition existing in your bank and the urgent need . . . for effective work in the way of relieving it. . . ." (R. 600.)

That such report required advice "every thirty days . . . over the signatures of the directors"; and that no action was taken to enforce that requirement. (R. 600-602.)

Reasons for failure to correct such condition. (R. 603.)

Receipt of a false letter of reply from vice-president Paul Hoover bearing on this matter. (R. 605.)

Complaint sent to directors October 22, 1935—reference therein to serious problem created by directors' loans,[38] viz. (R. 607):

Fleishhacker indebtedness	$13,442,109.82
Dollar accounts	6,182,616.39

Unsound conditions as of December 19, 1935. (R. 618-623.)

Conference with Mortimer Fleishhacker at Comptroller's office in November, 1936. (R. 647.)

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[38]Includes credit lines of Herbert and Mortimer Fleishhacker, who were respectively president and chairman of the board—also various corporations in which they were interested. Many of the directors were involved in the same situations. The Dollar account included indebtedness of director R. Stanley Dollar, the family corporation—Robert Dollar Co.—and various matters. Other directors were involved in these situations. Schedules describing these accounts are attached to the O'Connor interrogatories. See R. 620-623, 626, 628.

Whether complaint was ever lodged with Federal Reserve under 12 USCA 77 to secure removal of bank officers responsible for mismanagement. (R. 647-648.)

Complaint to directors on December 21, 1937, containing reference to

> "The lack of progress *during the last eighteen months* . . . (with request) . . . to consider . . . letter at the next regular meeting of the board and to reply in detail over the signatures of the attending members." (R. 649, 654.)

Persons responsible for failure to enforce Federal Banking Laws as against the Anglo management during the period 1933-1938. (R. 658-659.)

Duties of Comptroller of the Currency.

The Comptroller is head of a bureau in the Treasury Department charged with enforcement of all laws affecting national banks (12 USCA 1). He appoints the federal examiners. (12 USCA 481.) National banks are examined twice a year. The Comptroller receives reports of such examinations. In 1933, he was given power to lodge complaints with the Federal Reserve, in order to obtain removal of bank officers engaged in unlawful or unsound practices. (12 USCA 77.)

Interrogatories to Marriner S. Eccles.

This witness has been Chairman of the Board of Governors of the Federal Reserve System since August 23, 1935. The Anglo, being a national bank, is automatically a member bank. (12 USCA 282.) We sought to propound the following questions:

Whether Federal Reserve Board was unsuccessful in obtaining cooperation from other agencies in correcting conditions at the Anglo Bank. (R. 682.)

Reasons for any such failure on the part of other agencies having jurisdiction—persons responsible. (R. 682.)

Whether Federal Reserve took any steps on its own behalf—what resulted therefrom. (R. 681-682.)

Duties of Federal Reserve.

The Board has independent power to examine all member banks, including national banks, when investigations by the Comptroller are not deemed sufficient. (12 USCA 483.) To avoid duplication, it is the practice of the Comptroller to send copies of all reports to the Federal Reserve.

The Board has independent power to receive complaints and remove officers. (12 USCA 77.)

Interrogatories to Leo T. Crowley.

This witness has been chairman of Federal Deposit Insurance Corporation since February 1, 1934. That agency insures deposits of all national banks. We sought to propound the following questions:

Procedure used by FDIC in correcting unsound conditions in an insured bank. (R. 686-690.)[39] That such powers have been exercised in other cases. (R. 688, 690.)

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[39]Witness is requested to confirm the following, as usual practice:

Notice to Comptroller; 120 days for correction; re-examination of bank to determine that violations of law have ceased; notice of intent to terminate insured status; hearing before FDIC board covering subjects of complaint; a final opportunity to obey the law, followed by a termination of insured status.

Whether FDIC lodged any complaint with the Comptroller or took other action to correct conditions at the Anglo between 1934 and 1938. (R. 691.)

Reasons for any refusal to act—persons responsible. (R. 691.)

Duties of FDIC.

This agency has access to all reports of the Comptroller, with independent power to inquire into the condition of any insured bank.[40] It received copies of all reports concerning Anglo. Power to take disciplinary action is granted by 12 USCA 264i.

Interrogatories to William F. Folger.

This witness is Chief National Bank Examiner. Questions were propounded to show custody of documents within the scope of a subpoena *duces tecum*. We sought a description of the following:

Correspondence with Fleishhacker management involving complaints. (R. 697.)

Correspondence with other agencies involving criticism of the condition of respondent bank. (R. 698.)

Documents showing complaints made by the Comptroller to other agencies. (R. 699.)

Documents showing complaints to Comptroller from other agencies. (R. 700.)

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[40]12 USCA 264k, sub. 4, gives access to Comptroller's reports; and subdivision 2 of that section provides for appointment of its own staff with power to act independently.

Interrogatories to Jesse Jones.

This witness is Secretary of Commerce. By Executive Order, that department has jurisdiction of all federal lending agencies. This includes RFC. Witness was Chairman of RFC 1933-1938; was then appointed Federal Loan Administrator.

The Reconstruction Finance Corporation became interested in the affairs of the Anglo Bank in June, 1933. It granted a loan on sub-standard assets, and also provided part of the funds needed for an issue of preferred stock.[41] These transactions resulted in the delivery of documents establishing control over the management.[42] The bank issued the following instruction:

"July 11, 1933

To the Comptroller of the Currency,
Washington, D.C.

Sir:

You are requested and this letter will be your authority to furnish the Reconstruction Finance Corporation, at our expense, *full and complete copies of all reports of examination* of this institution here-

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[41]$35,000,000 loan granted to bank affiliate, Progress Mortgage Company, secured by pledge of sub-standard assets; separate loan granted to a concern known as September Company to cover purchase price of $2,500,000 of preferred stock. This was a collateralized loan under 12 USCA 51d.

[42]Interrogatories to Jones describe the following:

(1) Letter signed by Herbert and Mortimer Fleishhacker (June 28, 1933) granting the right to vote all preferred shares held by said parties in the bank. Letter contains covenant to elect designated directors and to permit RFC to nominate first vice-president. (R. 673-675.)

(2) Letter from bank to RFC authorizing auditing of books and records—and limiting compensation of officers to sums approved by such agency. (R. 672-673.)

In December, 1938, the old preferred stock was redeemed. A new issue was created in a larger amount. RFC continued to occupy a proprietary relation.

after prepared by your office. You are also requested and authorized to deliver to the Reconstruction Finance Corporation *copies of all letters sent to this bank by your office relating to such examination.*

This letter is to be in full force and effect until revoked in writing by this bank and the Reconstruction Finance Corporation.

Very truly yours,

The Anglo California National Bank of San Francisco

By .....

Its President.

Attest:

Cashier....." (R. 660.)

That letter was uncovered by an examination of the minute book made in the spring of 1942. Access was obtained by Court order. (R. 298.) It was not put in evidence. There was no opportunity to do so. It appears as an exhibit to the O'Connor deposition. (R. 660.)

Questions were propounded to establish:

That RFC received copies of all bank examiners' reports pursuant to this letter. (R. 669-670.)

That power to control the bank management was never exercised. (R. 676.)

That RFC failed to act between 1933 and 1938 to correct the conditions disclosed by the examiner's reports. (R. 671-672.)

September Company matter.

The recapitalization of June 1933, involved issuance of $5,000,000 in preferred stock. Standard Oil Company of

California took one-half of that issue. The balance was registered in the name of September Company—a dummy wholly owned by Mortimer and Herbert Fleishhacker. (R. 1284-1285, 1449.)

September Company received a $2,500,000 loan from RFC to purchase its share of the preferred. (R. 1449, 1691.) It realized a secret profit from the venture.

RFC funds were advanced at a five per cent rate.[43] The stockholders of the bank paid six per cent in dividends on the same capital. (R. 1284.) The secret profit amounted to $25,000 per annum. It was received by Mortimer and Herbert Fleishhacker as the owners of September Company. The arrangement continued from 1933 until 1938. The total profit was $148,040.85.[44]

There was no legal reason for this circuitous handling of funds. RFC has authority under 12 USCA 51(d) to take stock directly in its own name. Mortimer Fleishhacker represented the stockholders in the negotiation.

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[43]Under 15 USCA 605b(b) the RFC is required to file reports with Congress. Our attention was directed to that section in briefing our case for the Circuit Court. We requested the Secretary of the Senate to search his files. He found a copy of the RFC report filed for the month of June, 1933. The relevant entry has been certified. This is contained in an exhibit lodged with the clerk of this Court on certiorari. It shows:

"September Company, $2,500,000 5%"

This report, and the entry quoted, are judicially noticed. (*Arizona v. California*, 283 U.S. 423 at 452, 453.)

[44]R. H. Holmberg, assistant secretary of the bank, testified in July, 1941, as to the amount of dividend payments made while the old preferred issue was outstanding. (R. 1285-1286.) We have taken these figures and divided to get the equivalent for the one-half held in September Company. Five percent interest on the RFC loan is calculated for the time same was outstanding. The difference represents secret profit, viz.:

September Co. dividends	$824,082.50
Interest paid to RFC	676,041.65
Secret profit	$148,040.85

He was a fiduciary. (*Pepper v. Litton*, 308 US 295.) It was his duty to get the best possible bargain for them. It was his duty to get these funds at a five per cent rate. He had no right to enter into an arrangement whereby the stockholders would have to pay six per cent.

Questions were propounded in connection with this matter. These included inquiry into conferences with Mortimer Fleishhacker resulting in granting of the loan (R. 664-666); knowledge of the Fleishhacker interest in September Company (R. 666-667); and identity of the persons who passed on the application under 12 USCA 51d. (R. 667-668.)

Privilege of Witnesses.

All witnesses are subject to process unless exempted by statute or by some valid regulation. Discovery rules apply to all matters "not privileged" which are "relevant to the subject matter involved" in a pending action. (Rule 26 FRCP.) We therefore consider the status of the various parties named:

Bank Officers.

Since the corporation was a party defendant, its officers and directors are subject to cross-examination. Under Federal Rules, and also under California law, they may be treated as adverse parties.[44a]

[44a]Rule 43(b) FRCP permits calling of an adverse party or officer or director of a corporation which is an adverse party according to Rules of Cross-examination. Similar provision is made by California Code of Civil Procedure, Section 2055.

RFC Officials.

The status of such parties is the same as that of the agency which they represent. This was created with power to sue and be sued. (15 USCA 604.) It is subject to the ordinary burdens of litigation. See:

Reconstruction Finance Corporation v. Menihan Corp., 312 US 81;[45]

Keifer & Keifer v. Reconstruction Finance Corporation and Regional Agricultural Credit Corp., 306 US 381;[46]

Federal Housing Administration v. Burr, 309 US 242;

Federal Land Bank v. Priddy, 295 US 229.

RFC is a majority stockholder. Its conduct has become an issue. If made a defendant, the answer would be clear. It can make no difference where this agency, though not formally joined, is in fact involved. The power to be sued carries with it the right to interrogate officers of such agency.

Comptroller and Chief Bank Examiner.

Reports of National Bank Examiners have been admitted without question in many cases.[47] If there is a

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[45]Held liable to payment of costs of suit, in like manner as an ordinary litigant.

[46]Held that an affiliate of RFC inherited the capacity to "sue and be sued", which Congress provided for RFC as the parent corporation, and that full legal responsibility was necessarily created as against such affiliate.

[47]The Federal Reserve Act expressly recognizes the right of a Court to issue process respecting matters involved in a bank examination. 12 USCA 484 provides:

"No bank shall be subject to any visitorial powers other than such as are authorized by law, *or vested in the courts*

privilege—the bank could waive it. If that is true, stockholders defending its rights have equal standing.

Federal Deposit Insurance Corporation.

Also created with power to sue and be sued. (12 USCA 264j.) Its officers are subject to the rule governing RFC.

Federal Reserve.

The rule applicable to the Comptroller and Bank Examiners should apply. We are aware of no statute creating privilege. If there be any, petitioners as representatives of the bank, have power to waive it.

The general rule is as declared by Chief Justice Marshall in *United States v. Burr,*—

> "The court can perceive no legal objection to issuing a subpoena duces tecum to any person whatever, provided the case be such as to justify the process."

The right to maintain discovery against federal agencies has been recognized under existing Rules of Civil Procedure.[48]

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of justice or such as shall be or shall have been exercised or directed by Congress. . . ."

Examiners' reports have been admitted in evidence in many cases. See: *Cox v. Montague*, 78 Fed. 845; *Anderson v. Akers*, 7 Fed. Supp. 924 at 939-941; *Atherton v. Anderson*, 99 Fed. (2d) 883 at 889; *Goess v. Ehret*, 85 Fed. (2d) 109; *Federal Deposit Insurance Corp. v. Mason*, 115 Fed. (2d) 548; *Werner v. Crippen*, 245 App. Div. 363, 282 N.Y. Supp. 722, 270 N.Y. 535, 200 N.E. 305; *In re Culhane*, 269 Mich. 68, 256 N.W. 807; *In re Millspaugh*, 307 Mo. 185, 270 S.W. 110; *In re French*, 315 Mo. 75, 285 S.W. 513, 47 ALR 688.

[48] *Fleming v. Bernardi*, 1 FRD 624; *Brewer v. Hassett*, 2 FRD 222; *United States v. General Motors Corporation*, 2 FRD 528; also article at 56 Harvard Law Review, 1125, "Discovery against Federal Administrative Agencies", by Pike and Fischer.

Simple Question Involved.

Petitioners are not responsible for the conditions which have made it necessary to resort to process. *There should be no difference between the right to oppose a settlement by this corporation, and the right to take such action against any other concern.*

There is a simple standard which the law applies to management. This involves the duty to act impartially and without conflict of interest. The violation of that principle has prevented negotiation of a fair settlement.

Three years ago we made a suggestion which, in the interest of stockholders, ought to have been accepted. This was evidenced by a letter sent to the president. We quote therefrom:

"Aaron M. Sargent
1115 Hobart Building
San Francisco, California
Tel.—EXbrook 1447

May 28, 1941

William H. Thomson, President,
Anglo California National Bank of S.F.,
No. 1 Sansome Street,
San Francisco, California.

Dear Sir:

Subject: Denicke v. Fleishhacker, et al
Settlement Discussions.

You have submitted to Mr. Denicke for comment a proposal that the bank accept in full discharge of liability now asserted . . . the sum of $350,000 . . . Mr. Denicke has been requested to indicate his acceptance or rejection of this proposition. . . .

We are not in possession of those facts which are necessary to an impartial consideration of this proposition. . . .

We feel a lack of confidence in the legal representation of the bank's affairs in regard to this case. This feeling extends to the matter of the adequacy of the amount proposed. Our experience in these negotiations indicates that further progress may not be expected through negotiations conducted in the same channels. . . .

We believe that the bank should consider the employment of some firm having no prior connection with any of these matters and that we should then attempt to adjust controversies in a manner which will eliminate these difficulties. . . .

We have decided to make ourselves available to any group of the defendants who desire to negotiate a settlement. If an offer is obtained in an amount which we feel justified in recommending to the court, —we will submit such figure to you and then ask for its acceptance.

If the bank should decide to retain special counsel for further negotiations in this matter, and if it should then appear that further discussions are possible, free of the conditions which have so far frustrated our efforts,—we will be willing to participate therein.

Very truly yours,
Aaron M. Sargent."
(R. 1651-1668.)

ams/em

For three years there have been secret negotiations. Petitioners were not at the conference table. Applications made to the District Court were not accompanied by that frank disclosure which the situation demanded. It has

been necessary to continue suit to obtain relief. *There has been no effort to determine how much can be collected by counsel not acting under disqualification.*

XIII.

Certiorari to Protect Right of Appeal.

There has been no trial and no review on appeal. It is clear from the action taken in the Circuit Court, that there was a total failure to exercise jurisdiction. A miscarriage of justice has resulted. The jurisdiction of this Court is based on Jud. Code 240 (28 USCA 347), which provides:

> "In any case, civil or criminal, in a Circuit Court of Appeals . . . it shall be competent for the Supreme Court of the United States . . . to require by certiorari . . . that the cause be certified . . . with like effect as if . . . brought there by unrestricted writ of error or appeal."

This jurisdiction resulted from the Act of March 3, 1891 (26 Stat. 826) creating the Circuit Courts of Appeals, and subsequent amendments. Congress assumed that the creation of an intermediate Court of Appeal would satisfy the requirement of due process and permit this Court to act under a limited jurisdiction. This is recognized by Rule 38, which provides:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. . . ."

In exercising this limited jurisdiction, there has been a definite responsibility. That subject was covered by the testimony of Justice Van Devanter before the Senate Judiciary Committee in 1935.

> "Petitions for certiorari are not determined by a majority vote. If as many as four members of the Court, which is a minority, vote for granting a petition for certiorari, it is invariably allowed. Mr. Justice Brandeis (present as a member of the Committee of the Court) has been on the Court for twenty years, and he will not recall a single instance in all that period where a petition for certiorari which commended itself to four members of the Court was not granted. That is a rule that is understood and adhered to, and it works well. The point is that in exercising that certiorari jurisdiction the Court desires to be at fault in taking jurisdiction rather than to be at fault in rejecting it. That rule is not one of recent years. It originated before almost all of the members of the Court ever thought of being there."[49]

During hearings on the Judiciary Amendments of 1925 concern was expressed over the proposal to create a discretionary right of review.

> "Senator Walsh of Montana expressed serious disagreement. He was opposed to making the Circuit Courts of Appeals final arbiters of constitutional questions. 'I find it difficult,' he said, 'to yield to the idea that the Supreme Court of the United States

[49]Hearing on Senate Bill 2176, 74th Congress, 1st Session, in 1935, pp. 9-10, cited in "Jurisdiction of the Supreme Court of the United States"—Robertson & Kirkham, p. 542.

> ought to have the right in every case to say whether their jurisdiction shall be appealed to or not.' He distrusted the principle which underlay the bill, namely, the extension of the discretionary jurisdiction of the Supreme Court. Resort to certiorari appeared to him too precarious for litigants because too capricious in its actual operation."[50]

In most certiorari matters, petitioner has had the benefit of review by a lower Court, either state or federal. His application for further review is based on the importance of the problem.

We are here to obtain a review which ought to have been granted in a Circuit Court. The due process clause of the Fifth Amendment applies to the proceedings had in that Court. That clause has been violated.

We are here to obtain a review which ought to have been granted in a Circuit Court. The due process clause of the Fifth Amendment applies to the proceedings had in that Court. That clause has been violated.

Denial of Due Process in the Circuit Court.

We took an appeal in the Ninth Circuit. Nine substantial questions were presented. None of them have been decided. It is impossible to read the petition for rehearing in bank (R. 2017) without forming that conclusion. An opinion was filed during adjournment. Two members of the Court were not willing to sign it. The Court had a membership of six. It was impossible to

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[50] "The Business of the Supreme Court"—Frankfurter and Landis, p. 276.

obtain consideration from any judge not originally assigned. Every remedy has been exhausted. It has been impossible to obtain relief. *We have come to a forum located three thousand miles from the place of our residence, because it has been impossible to obtain a decision in any other Court.*

We apply for writ of certiorari directed to the Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
June 7, 1944.

AARON M. SARGENT,
Attorney for Petitioners.